biennially to determine whether they remain necessary.[91] That directive includes, of course, the newspaper/broadcast cross-ownership restrictions.[92]

NAA submits that the Commission should take advantage of this opportunity to give broadcasters and newspaper publishers the freedom to continue to compete effectively with cable and other multichannel providers, as well as with new print and computerized sources of news, information, and entertainment. Relief from the outdated cross-ownership restriction will not only help preserve broadcast stations and newspapers as viable voices, but will spur their evolution into more diversified and innovative competitors in today's technologically advanced multimedia marketplace.

B. The Newspaper/Broadcast Cross-Ownership Ban Has in Fact Failed to Promote Diversity.

As discussed above, the Commission promulgated the newspaper/broadcast cross-ownership rule with the "hope" of promoting diversity. After two decades of experience under the restriction, however, the evidence indicates that the rule has served not to further, but to undermine that goal.

Indeed, in granting the Commission's consent to a permanent waiver of the rule to allow Rupert Murdoch to control both a daily newspaper and a television station in New York City, Commissioners Quello and Duggan both observed that the cross-

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[91] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 111-12 (1996).

[92] As indicated in the <u>Notice of Inquiry</u>, the former restriction on repealing or reexamining the rule is no longer contained in the FCC's appropriations legislation. 11 FCC Rcd at 13006-07, n.20.

ownership rule, by excluding local broadcast station owners as prospective buyers, had contributed to the demise of the Washington Star.[93] As Commissioner Duggan aptly noted, that result certainly was "[n]o victory for media diversity."[94] The Washington Star was not, unfortunately, an isolated example. Between 1988 and 1993, at least 115 daily newspapers failed throughout the United States.[95] At least some of those papers might well have survived had local broadcasters been eligible to acquire struggling dailies in their home communities.

As noted above, evidence compiled by the Commission itself in the proceeding in which it adopted the restriction indicated that newspaper/broadcast cross-ownership fosters better local newsgathering and public affairs programming.[96] Ironically, then, the combinations banned by the Commission were shown to have done a better job of creating local non-entertainment, informational programming -- the type of programming at the very core of the Commission's diversity concerns -- than non-commonly owned stations.

This result, NAA submits, is not surprising; the Commission reached similar conclusions when it was considering whether to modify the one-to-a-market rule. There, the Commission determined that group ownership of broadcast stations enhances

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[93] See Fox Television Stations Inc., 8 FCC Rcd 5341, 5369 (1993) (Separate Statement of Commissioner Duggan).

[94] Id.

[95] See Fox Television Stations Inc., 9 FCC Rcd 5246, 5249 n.10 (1994) (Separate Statement of Chairman James H. Quello) (Erratum).

[96] See Second Report and Order, 50 FCC2d at 1078, n.26.

the availability of informational programming.[97] Indeed, the Commission has concluded that group-ownership may also "enhance the quality of viewpoint diversity by enabling such stations to invest additional resources in programming and other service benefits provided to the public."[98]

There is no reason to believe that future newspaper/broadcast cross-owners would not provide excellent service to the public. Indeed, it only stands to reason that a newspaper dedicated to covering the issues and events affecting its local community would be equally committed to providing local news and programming over a commonly-owned broadcast facility. Co-owners of multiple media outlets, moreover, have a strong economic incentive to differentiate the "products" offered on those outlets, in order to tap additional audiences or subscribership and maximize the overall reach of the commonly-owned facilities.[99]

In sum, not only would elimination of the newspaper/broadcast cross-ownership rule help to enhance overall diversity by enabling more troubled local daily newspapers or stations to survive, but it would also help to achieve the Commission's goal of increasing the amount and improving the quality of news, public affairs, and local programming on radio and television broadcast stations.

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[97] 1989 One-to-a-Market Decision, 4 FCC Rcd at 1748. The FCC has noted repeatedly that "combinational efficiencies derived from common ownership of radio and television stations in local broadcast markets and from common ownership of same service radio stations in local markets [are] presumptively beneficial and would strengthen the competitive standing of combined stations." Golden West Broadcasters, 10 FCC Rcd 2081, 2084 (1995) (TV/FM/2 AM).

[98] Golden West Broadcasters, 10 FCC Rcd at 2084.

[99] See infra Section IV.C.1.

C. **Given the Explosion in the Number of Media Outlets and the Courts' More Recent Scrutiny of Policies that Restrict Commercial Speech, the Newspaper/Broadcast Cross-Ownership Policy Is No Longer Supportable.**

Nearly two decades ago, the FCC's newspaper/broadcast cross-ownership rule was sustained against a First Amendment challenge by the Supreme Court in FCC v. NCCB, in which the Court held that the restriction was a rational means of promoting diversity in the mass media. As demonstrated in Section III above, however, the information marketplace in which newspapers and broadcast stations compete has changed dramatically since the Supreme Court's 1978 decision. The number of broadcast stations has increased greatly, along with the availability of a wide variety of alternative sources of information/entertainment and competing advertising outlets. Conversely, the number of independent daily newspapers has declined significantly.

Given these radical changes in the marketplace, NAA submits, the newspaper/broadcast cross-ownership ban is no longer justifiable.[100] Moreover, recent judicial actions such as those striking down the cable/telco ban[101] and the ban on alcohol price advertising[102] strongly suggest that the courts today would require a

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[100] Cf. Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989) ("Syracuse Peace Council"), cert. denied 493 U.S. 1019 (1990) (Court suggested that continued enforcement of the Fairness Doctrine may be arbitrary and capricious due to First Amendment infirmities).

[101] Chesapeake & Potomac Telephone Co. v. U.S., 42 F.3d 181 (4th Cir. 1994) ("C & P v. U.S."), vacated and remanded sub nom., United States v. C & P, 116 S. Ct. 1036 (1996).

[102] 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996).

far stronger showing than was made in 1975 to support such a direct limitation on the free speech rights of a particular class of citizens. This dramatically changed environment demands, and the NAA strongly urges, that the Commission reassess not only the continued need for the policy but also its validity under appropriate First Amendment scrutiny.

1. The Original Rationale for the Policy Is No Longer Valid in Today's Highly Competitive Multimedia Marketplace.

In adopting the rule in its 1975 Second Report and Order, the Commission stated that its primary concern was to promote diversity in broadcast voices.[103] Noting that its diversification policy is derived from both the First Amendment and economic sources, the Commission determined that "requiring competition in the market place of ideas is, in theory, the best way to assure a multiplicity of voices."[104] Despite the absence of any hard evidence in support of its position, the Commission adopted a prospective ban on newspaper-broadcast cross-ownership combinations and required divestiture in "egregious" cases where existing combinations were deemed to be effective monopolies.

The prospective ban and limited divestiture requirement were eventually upheld by the Supreme Court in FCC v. NCCB.[105] As the Supreme Court noted, there was

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[103] 50 FCC2d at 1074.

[104] Id. at 1049.

[105] 436 U.S. 775 (1978), overturning Nat'l Citizens Comm. for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977) (in which the D.C. Circuit had found that the (continued...)

little, if any, evidence of the exercise of market power (i.e., abuses such as maintaining artificially high advertising rates) by owners of co-located newspaper and broadcast stations.[106] The Court, however, determined that the Commission "was entitled to rely on its judgment, based on experience, that 'it is unrealistic to expect true diversity from a commonly owned station-newspaper combination.'"[107]

Whatever merit the cross-ownership ban may have had two decades ago, it cannot be seriously disputed that the dramatic increase in the number of competing media and advertising outlets since 1975 has eroded the original justification for the policy. The meteoric rise in the number and variety of available voices in today's information marketplace, detailed in Section III above, compels the Commission to reevaluate this outmoded regulatory policy, which continues to single out newspaper publishers as ineligible -- as a class -- to hold licenses for broadcast stations in their local markets. In fact, the FCC has repeatedly recognized the change in the level of competition in the mass media field in its decisions eliminating or substantially relaxing most of its other media ownership rules.[108] Moreover, the Commission has expressly

[105](...continued)
Commission erred in limiting the divestiture requirement to the so-called "egregious" cases).

[106] Id. at 786 ("In the Commission's view, . . . no pattern of specific abuses by existing cross-owners was demonstrated.").

[107] Id. at 776.

[108] See, e.g., Memorandum Opinion and Order and Further Notice of Proposed Rulemaking (Revision of Radio Rules and Policies), 7 FCC Rcd 6387 (1992) ("1992 Revision of Radio Rules") (noting "the dramatic increase in competition and diversity in the radio industry over the last decade" as basis for relaxation of radio ownership rules).

questioned the continuing validity of the notion, underlying the newspaper rule, that governmentally mandating a larger number of station owners necessarily results in greater diversity.[109]

Accordingly, as it was directed to do in Syracuse Peace Council (FCC on remand required to reevaluate the constitutionality of its policy), the Commission should carefully reevaluate the constitutionality of the anachronistic newspaper/broadcast cross-ownership policy.[110] Failure to reexamine this issue in light of the changed factual circumstances over the past two decades, NAA submits, would be patently unfair to newspaper publishers, who continue to be denied the regulatory relief that has been granted by Congress and the Commission to virtually every other media player.

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[109] In other proceedings, the FCC has cited studies that indicate that a monopolist would have the incentive to air diverse programming to generate the largest collective audience, in contrast to the Commission's previous view that "51 stations provide more diversity than 50." Further Notice of Proposed Rule Making (Review of the Commission's Regulations Governing Television Broadcasting), 10 FCC Rcd 3524, 3550-3551 (1995) ("But where one party owned all the stations in a market, its strategy would likely be to put on a sufficiently varied programming menu in each time slot to appeal to all substantial interests.") Id. (citation omitted). See also Revision of Radio Rules and Policies, 7 FCC Rcd 2755, 2771-72 (1992) ("In addition, commentors tend to agree with the Notice that greater combination will not harm diversity because, while competing stations might try to reach the same core audience, a single owner might try to program different stations to appeal to different audience segments in order to maximize its total audience size."); 1992 Revision of Radio Rules, 7 FCC Rcd at 6389 ("[T]he Commission concluded that relaxation of the national caps may actually enhance the quality of viewpoint diversity, as economies of scale from group ownership provide additional resources to invest in programming.").

[110] 867 F.2d at 656 ("an agency could not blind itself to a constitutional defense to a 'self-generated' policy") (citation omitted).

2. **Under the Courts' Recent Application of an "Intermediate" Scrutiny Test to Restrictions on Commercial Speech, the Commission's Newspaper/Broadcast Policy Could Not Be Sustained.**

In addition to the recent changes in the communications marketplace, the Commission should note that First Amendment jurisprudence also has evolved considerably since 1978. The courts have grown increasingly skeptical of limitations on speech that are employed to accomplish non-speech related goals such as the protection of competition. For example, in C & P v. U.S.,[111] the Fourth Circuit found a similar provision, the cable/telco cross-ownership ban, unconstitutional. In so doing, the court first reaffirmed that cable television service is a form of "speech" protected by the First Amendment. Because the cross-ownership provision impaired a telephone company's ability to engage in this form of protected speech, it was found to infringe upon the company's First Amendment rights. The court concluded that the restriction should be subject to intermediate scrutiny -- i.e., that the restriction must be shown to advance a substantial governmental interest in a narrowly tailored manner.[112] The Fourth Circuit agreed with the United States that the government had

[111] 42 F.3d 181.

[112] The Fourth Circuit observed that the restriction was not a direct regulation of broadcast frequencies, and that there was no physical limitation on the number of channels that a cable system can support. The Court concluded that, without such a concern for scarce resources, the regulation must be subject to more than minimal scrutiny.

In the past, broadcast regulations have been subject to a lesser degree of constitutional scrutiny based on the notion that the scarcity of broadcast frequencies (continued...)

a significant interest in (1) preventing telephone companies from discriminating against non-affiliated cable companies in the use of either telephone poles or telephone wires; and (2) preserving diversity in the market of electronic access (i.e., preserving the availability of two wires to every home). The court concluded, however, that the prohibition against local telephone companies offering cable television service was not narrowly tailored to serve the stated purposes.

On the contrary, the court concluded that there were simpler and more efficient means of guaranteeing cable companies access to telephone poles and wires. For example, Congress could have limited telephone companies' editorial control over video programming to a fixed percentage of the channels available, and required them to lease the remaining channels to other video programmers. Further, the court pointed out that the legislation did not prevent cross-subsidization from one monopolized industry to another, as telephone companies were still free to enter the video delivery service market. Finally, the court concluded that the restrictive provisions did not

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[112](...continued)
allowed a larger role for government regulation. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969). The media world has changed so dramatically, however, that the original spectrum scarcity rational that underlies the Red Lion doctrine may no longer justify a lower level of judicial scrutiny for broadcast regulation than for other forms of media. In fact, more than a decade ago, the Supreme Court recognized that new technology such as "cable and satellite television" -- and the resulting access to diverse programming that communities have -- may render the scarcity doctrine "obsolete." Fed. Communications Comm'n. v. League of Women Voters of California, 468 U.S. 364, 376-77, n.11 (1984). See also News America Publ'g., Inc. v. FCC, 844 F.2d 800, 811 (D.C. Cir. 1988) ("The Supreme Court ... has recognized that new technology may render the [broadcast scarcity rationale] obsolete -- indeed, may have already done so.").

provide telephone companies with sufficient alternative means of communication.

Although the government argued that telephone companies still would be able to sell their programs to other cable systems or TV stations, the court rejected this contention. Unlike other video programmers, a telephone company cannot guarantee that its programming will reach the desired audience. The court concluded that, to the extent that telephone companies would be forced to rely upon other local broadcasters and cable operators for distribution, the restriction unconstitutionally regulated a telephone companies' ability to compete in the video programming market.

Similarly, the Supreme Court recently invalidated a ban on liquor advertising that had the effect of increasing prices.[113] Applying an intermediate scrutiny test, the Court struck down Rhode Island's ban on all advertising of alcoholic beverage prices outside liquor stores as broader than necessary to accomplish the state's goal of lowering alcohol consumption. The Court held that there were less restrictive means of accomplishing the government's goal that did not limit speech, such as the imposition of a price floor.

In fact, the Supreme Court often has struck down restrictions on commercial speech as insufficiently narrowly tailored. For example, last year the Court held unconstitutional a federal law prohibiting beer labels from displaying alcohol content, noting that many alternatives were available that "could advance the Government's

[113] See 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495.

asserted interest in a manner less intrusive to respondent's First Amendment rights."[114] Applying this narrow tailoring requirement, the Court has made it clear that the government may not restrict commercial speech if non-speech-restrictive alternatives are available to serve the government's interest.

NAA submits that, as in C & P Telephone and Coors, there are certainly less restrictive, more narrowly tailored alternatives available than the outright ban on newspaper/broadcast cross-ownership that is in place today. For example, even absent the newspaper/broadcast ban, newspaper publishers would remain subject to the rules limiting radio and television station ownership in general. Further, to the extent the Commission seeks to promote and preserve economic competition (e.g., for advertising revenues), it may appropriately rely on the antitrust laws and defer to the Department of Justice and/or the Federal Trade Commission for enforcement.

In light of the changes in the marketplace described above, there is no need to maintain a complete ban on local newspaper/broadcast cross ownership in order to foster diversity in the marketplace. On the contrary, technological advances and growth in the marketplace already have provided the "hoped for" gain in diversity the

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[114] Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1593 (1995). See also Central Hudson Gas & Elec. Corp. v. Public Service Comm'n., 447 U.S. 557, 566 (1980) (in which the Supreme Court stated that when the government seeks to restrict speech, it has the burden of demonstrating a substantial interest, and that the restrictions imposed are "not more extensive than is necessary" to advance those interests); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 418 (1993) (in which the Court invalidated an ordinance prohibiting the use of newsracks to distribute commercial handbills, holding that "if there are numerous and obvious less burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.").

1975 cross-ownership ban was intended to foster. Indeed, particularly in light of the Commission's recent easing of the application of the one-to-a-market rule, which now routinely allows one entity to own at least one television station, two AM, and two FM stations, and other recent and proposed relaxations of its media ownership limitations, there is certainly no basis for the FCC to continue to preclude newspaper publishers from owning any same-market broadcast stations.

In sum, NAA submits that the Commission has an obligation to review the legality of its newspaper/broadcast cross-ownership ban in light of the substantial changes in the information marketplace in the two decades since the rule was adopted, as well as the increasingly stringent requirements of applicable judicial precedent.[115] Upon such review, NAA is confident that the Commission will conclude that the underlying rationale has deteriorated to such an extent that the cross-ownership restriction may no longer be maintained.

V. THE COMMISSION SHOULD ADOPT A LIBERAL WAIVER POLICY AND MOVE QUICKLY TO COMMENCE A RULEMAKING PROCEEDING DESIGNED TO ELIMINATE THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE IN ITS ENTIRETY.

NAA recognizes that the Commission, in this proceeding, seeks only to determine what changes, if any, should be made to its newspaper/radio cross-ownership waiver policy. For the reasons set forth above, however, NAA submits that the Commission should move quickly to commence a rulemaking proceeding looking

[115] See Syracuse Peace Council, 867 F.2d 654.

toward the repeal of the anachronistic cross-ownership ban now set forth in Section 73.3555(d) of the Rules. In the interim, and at a minimum, the agency should adopt a liberal waiver policy that provides a reasonable assessment of the current level of competition and diversity by taking into account the wide array of competing media now present in virtually every market and by using a geographic market definition comparable in scope to those used in the context of other cross-ownership rules. Moreover, the Commission should refrain from imposing additional barriers to waiver of the newspaper/radio cross-ownership rule, such as a "special circumstances" requirement, that are not applied in other cross-ownership waiver situations.

A. A Presumptive Waiver Standard Based Upon a Minimum Number of Voices, Without Regard to Market Rank, Will More Effectively Reflect the Level of Media Competition Present in a Station's or Newspaper's Service Area.

The Commission asks, first, whether it should adopt a waiver policy in which a transaction is deemed to be in the public interest "if it is in a market of specified numerical rank or larger and a specified number of independently owned voices would remain" after the proposed transaction. Alternatively, the agency inquires whether a "waiver test [should] turn on whether a specified minimum number of voices remains after the transaction without reference to market rank."[116]

NAA supports the use of a presumptive waiver standard based upon the presence of a minimum number of voices test, without reference to the market's

[116] Notice of Inquiry, 11 FCC Rcd at 13009.

numerical ranking. A standard utilizing numerical market rankings (which are based on population, number of television households, etc., rather than the actual level of diversity within the market) could result in a proposed combination being disapproved even though the market in question in fact had greater diversity than another market deemed "larger" under a numerical market ranking. There is no reasoned basis for refusing to grant a waiver -- notwithstanding the presence of a diversity of media sources -- merely because the market in question has failed to achieve a sufficient "rank," and, thus, no reason to utilize market rankings in the Commission's analysis.[117]

NAA recognizes that, in revising its one-to-a-market waiver policies in 1989, the Commission imposed a market rank test out of an abundance of caution.[118] There, the Commission acknowledged, however, that the standard it adopted "is conservative and may far exceed the market size and the number of voices necessary to ensure diversity and prevent competitive abuses."[119] Given the continued and growing vitality of these larger markets and the experience of several years under the admittedly restrictive one-to-a-market test, NAA believes that the Commission should now feel entirely comfortable in adopting a test based solely on the number of voices in

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[117] Moreover, if the standard included a market rank component, the Commission would have to determine how to deal with changes in market ranking over time. The Commission has noted the problems that arise from freezing a list of market designations that will eventually become outdated. See Definition of Markets For Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules, 11 FCC Rcd 6201, 6220 (1996) ("Television Market Definition").

[118] See 1989 One-to-a-Market Decision, 4 FCC Rcd at 1751.

[119] Id.

the market. A simple and straightforward "minimum voices" test will both ensure that the agency's goals of preserving competition and diversity are met and make it easy for the parties and the Commission to determine whether a particular transaction satisfies the requirements of the waiver policy.

B. The Commission Should Scrupulously Avoid Any Policy that Requires "Weighting" of the Strength or Impact of Particular Media Outlets or Information Providers.

The Commission also seeks comment on whether it should "give equal consideration to waiver requests irrespective of the strength of the particular media outlets involved," or give "different consideration to requests depending on whether the newspaper involved is a major paper or the radio station involved has a certain level of market penetration, has a certain level of authorized power, or is of a particular class of station."[120]

NAA submits that the Commission should not become involved in evaluating whether a particular speaker carries more, less, or the same "weight" as another. Indeed, in a recent one-to-a-market case, the Commission expressly recognized that proposed combinations of stations with "significant" technical facilities do not present issues of market dominance when a substantial number of competing facilities are present in the market.[121] In other words, given an adequate level of overall diversity

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[120] Notice of Inquiry, 11 FCC Rcd at 13010.

[121] S.E. Licensee G.P. et al., FCC 96-463, ¶ 19 (rel. Nov. 27, 1996).

in a market, there is no need to analyze the technical facilities of the properties to be commonly owned.

Moreover, NAA submits that the public -- and not the agency -- is the only appropriate body to determine the "strength" of one voice as opposed to another. Thus, there is no justification for creating different standards for urban and suburban newspapers, or "weighting" broadcast stations based upon their signal strength, audience levels, or any other characteristics. On the contrary, an appropriate waiver standard would focus simply on whether a particular source is available to consumers of ideas in the relevant geographic market, should they choose to listen, watch, or read that source.

Once the physical capacity of a station, newspaper, or other media competitor to reach the market is established, the only remaining distinction between market participants as sources of diversity or competition is the current effectiveness of their operations -- a factor that is continually in flux. Radio programming, for example, consists of a large variety of combinations of music, news, talk, and entertainment programming. To the extent that any one station is more successful at a given moment in attracting larger or otherwise more attractive audiences than other stations, that is purely a function of the success of its current programming and other operational characteristics -- all of which are freely available to its rivals as well. Format changes (or other programming adjustments) are extremely common in radio, and those adjustments frequently cause audience shifts (and, ultimately, shifts in advertising revenues). The fact that a particular station currently enjoys higher ratings than a rival station, however, does not make the rival any less "available" to listeners as an alternative source of entertainment or information. The same is true with respect to newspapers, cable and other video suppliers, and the other competitors in the media marketplace.

In short, the availability of a sufficient number of voices in the market, not the identity or strength of the speakers or the messages they currently deliver, is the key to a determination that adequate diversity exists and should be the sole area of inquiry for the Commission in evaluating waiver requests. Where a sufficient number of such voices exist, the Commission can be confident that the public will have access to a diversity of sources of information and opinion.[122] In such circumstances, a prohibition of common ownership of newspaper and broadcast outlets is not warranted.

C. The Presence and Impact on Diversity of the Full Range of Competing Information Providers Should Be Taken Into Account in Calculating the Number of Independent "Voices" in a Market.

As to the question of which voices should be included in determining whether sufficient diversity will remain in a market following a proposed combination,[123]

[122] Similarly, in view of the extremely high level of diversity among advertising vehicles in most markets, there is no reason to believe that undue concentration of economic power would be an issue on a generalized basis. To the extent the Commission has any residual concern about "market power," NAA submits that the Commission generally should defer to the Department of Justice and the Federal Trade Commission, the expert agencies charged with enforcement of the antitrust laws. See Section V.F., infra.

[123] See Notice of Inquiry, 11 FCC Rcd at 13010-11.

NAA urges the Commission to take into account all broadcast stations -- both commercial and non-commercial -- as well as the numerous and significant non-broadcast media discussed in Section III above.

With regard to broadcast stations, the Commission previously has recognized that non-commercial stations add to marketplace diversity and are properly included in evaluating one-to-a-market waiver requests.[124] NAA submits that the same reasoning applies in the present context as well, and that there is no reason to exclude non-commercial stations from any diversity evaluation.

Moreover, any waiver standard adopted by the Commission should recognize that, as set forth above, newspapers and radio broadcast stations -- indeed, all information providers -- operate in a far different competitive environment than the one they faced 20 years ago. Not only television and radio stations, but cable television, wireless cable, direct broadcast satellites, Internet services, and other information sources are providing the public with access to an unprecedented amount of information -- as well as competing for the consumer and advertising dollar. The Commission recognized in the 1989 one-to-a-market proceeding that marketplace diversity was enhanced by these media, but -- again out of an abundance of caution and because the one-to-a-market rule itself dealt only with traditional broadcast outlets -- opted not to include them in that waiver analysis.[125]

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[124] See 1989 One-to-a-Market Decision, 4 FCC Rcd at 1751.

[125] See id. at 1753.

NAA submits that the Commission's multiple ownership rules or policies, to the extent they are retained by the Commission as we approach the 21st Century, should be based on a recognition of marketplace realities and that an analysis of diversity therefore should include competing non-broadcast media. This is particularly true with respect to waivers of the newspaper/broadcast cross-ownership rule, which itself applies to more than traditional broadcast outlets. Newspapers are subject to intense and increasing competition from a wide variety of non-broadcast media, as discussed in Section III above. At an absolute minimum, the Commission should take into account (in addition to commercial and non-commercial television and radio stations) daily and weekly newspapers, cable systems, and wireless cable and other video program suppliers addressing local needs.

As set forth above, morever, a wide range of alternative media are present in virtually every market, and provide substantial competition for the more "traditional" information providers. Rather than engaging in an analysis of the number and impact of the specific alternative media outlets in each particular market, NAA submits that the Commission may wish to consider taking these media into account by counting broadcast, newspaper, cable, wireless cable, and other readily quantifiable "voices," but establishing the threshold number of such voices needed to support a waiver at a level substantially lower than the "30 voices" test currently used in the one-to-a-market context. Such a standard would both acknowledge the ubiquitous presence of alternative information providers and, at the same time, simplify the showing required to support a waiver.

D. The Commission Should Define the Market Realistically, Using Accepted Industry Standards With Respect to the Geographic Area in Which a Station or Newspaper Competes.

The Commission notes that the geographic area considered under its existing standard for evaluating newspaper/radio waiver requests is the area of overlap between the defining signal contour of the radio station and the area of significant circulation of the newspaper. The agency asks for comment, however, regarding the proper scope of the geographic market to be used to assess future requests for waiver of the rule.[126] NAA submits that the current method for assessing diversity in the context of the newspaper/radio cross-ownership rule is too limited, and supports adoption of a standard at least as broad as those used to determine the number of such voices in a market in the context of the Commission's other broadcast cross-ownership rules.

For example, as the Commission observes, the relevant market for purposes of the radio contour overlap rules is the area encompassed by the principal community contours of the mutually overlapping stations proposed to be commonly owned.[127] NAA believes that this well-established, yet conservative, standard is an appropriate starting point in evaluating the level of diversity in a market for purposes of newspaper/radio cross-ownership waivers as well. Thus, the Commission certainly should include in the "voices" count all broadcast stations whose principal community contours overlap either the area of significant circulation of the newspaper or the

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[126] See Notice of Inquiry, 11 FCC Rcd at 13011-12.

[127] See id. at 13012-13.

principal community contour of the radio station(s) to be commonly-owned with the newspaper.

As the Commission acknowledged in revising its radio contour overlap rules, however, the principal community contour overlap standard, without more, is "likely to be conservative in counting the number of stations receivable by listeners"[128] and thus likely to understate the true level of diversity in the area. Because it is equally likely that this standard would be under-inclusive as applied in the newspaper/radio context -- particularly where a smaller newspaper is involved -- NAA urges the Commission to adopt a supplemental test for determining the number of voices in the market.

In a number of other contexts, the Commission has concluded that the Nielsen Designated Market Area ("DMA") is the most accurate method for determining the areas served by local television stations.[129] Indeed, apart from the Congressionally-sanctioned use of DMAs in the must-carry rules, the Commission itself has recently confirmed its belief that the DMA, as a general matter, provides a reasonable "proxy" of a television station's geographic market, both for competition and for diversity purposes.[130] Similarly, in the 1989 proceeding in which it adopted the current "Top 25/30 voices" presumptive standard for waiver of the television/radio one-to-a-market rule, the FCC determined that it was appropriate to use the comparable Arbitron Area of Dominant Influence, or "ADI," to define the relevant television market, and the

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[128] Revision of Radio Rules and Policies, 7 FCC Rcd at 2779.

[129] See Television Market Definition, 11 FCC Rcd at 6220.

[130] See Review of Television Broadcasting Regulations, FCC 96-438, ¶¶ 14-15.

smaller included "television metro" portion of the market to define the geographic area in which radio stations compete.[131] Subsequently, in view of Arbitron's withdrawal from the television ratings field, the FCC announced that waiver proponents could submit broadcast "voices" computations based on the Nielsen DMA for television stations and the Nielsen television metro area for radio facilities.[132]

NAA submits that there is no legitimate reason to define the relevant geographic market for purposes of newspaper/radio waiver requests more narrowly than it is defined for purposes of the radio contour overlap and one-to-a-market rules. Accordingly, NAA urges the Commission to include in its "voices" count, in addition to those voices identified through use of the contour overlap method described above, (i) any television station licensed to a community within the same DMA; (ii) any radio station licensed to a community within the television metro portion of the DMA market; and (iii) any daily newspaper published in a community within the DMA. Further, assuming that the Commission determines to include non-broadcast media in the diversity analysis, the NAA urges the Commission to include those non-broadcast media present in these geographic areas as well. Adoption of these combined tests, NAA submits, will enable the Commission to arrive at a realistic assessment of the level of diversity in the economic market in which the newspaper or radio station in question operates.

[131] 1989 One-to-a-Market Decision, 4 FCC Rcd at 1751.

[132] See Media/Communications Partners Limited Partnership, 10 FCC Rcd 8116, n.3 (1995). See also Review of the Commission's Regulations Governing Television and Broadcasting, 10 FCC Rcd 3524, 3539 n.59 (1995).

E. Applicants Should Not Be Required to Make Any Additional "Special Circumstances" Showing in Support of Waiver Requests.

The Commission also seeks comment on whether it should require a showing of "special circumstances" in situations otherwise meeting whatever "objective criteria" it may adopt.[133] NAA strongly opposes any policy that would require a preliminary finding that "special circumstances" exist, in addition to a "voices" count or similar diversity determination, before a waiver could be granted. There simply is no basis to impose any additional test to support a waiver of the rule,[134] particularly in light of the fact that no such requirement is imposed under the Commission's presumptive waiver policy as currently applied to local television/radio combinations.

Indeed, in adopting its one-to-a-market waiver policy in 1989, the Commission expressly determined that its concerns regarding diversity were so attenuated in the presence of a sufficient number of competing media voices that, given the other public interest factors present, no additional showing was necessary to support a grant of the

[133] Notice of Inquiry, 11 FCC Rcd at 13013.

[134] The legislative history to the 1994 appropriations order, referred to by the Commission in the Notice of Inquiry should not be regarded as requiring the Commission to adopt any "special circumstances" or "separate affirmative determination" requirement in connection with a relaxed waiver standard. Id. at 13006-08, 13013-14. As the FCC itself notes, the 1995 and 1996 appropriations acts and their accompanying conference reports contain no such language, and the proscription against spending funds to reevaluate policies related to the newspaper/broadcast cross-ownership rule has been eliminated. See id. at 13007-08. Thus, the 1994 legislative history should not be a factor in the Commission's consideration of this matter.

waiver.[135] NAA submits that application of an additional "special circumstances" requirement is equally inappropriate in the newspaper/broadcast context. Further, any requirement of a showing of proposed programming or other "content" benefits to be derived from a proposed transaction could involve the Commission unnecessarily in sensitive areas of editorial discretion that are entitled to substantial deference in view of the First Amendment interests at stake.[136]

F. No Additional Limitation on "Market Power" Is Necessary or Appropriate.

The Commission also asks whether, in evaluating waiver requests, it should "consider from a competition standpoint the size of the newspaper involved" or "establish a test based on the proportion of local advertising dollars that the proposed combination would command."[137] The Commission's concern in this regard appears to be generated largely by a reference to the percentage of local advertising expenditures "captured" by local newspapers as opposed to radio stations.[138]

As discussed briefly in Section III above, however, the 49 percent figure relied upon by the Commission is considerably oversimplified and overstated. For example, that figure includes revenues generated by the sale of classified advertising as well as

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[135] See 1989 One-to-a-Market Decision, 4 FCC Rcd at 1743.

[136] NAA does not object, however, to adoption of a waiver standard that allows for a separate "case-by-case" analysis of requests that do not meet the objective criteria for presumptive waiver.

[137] Notice of Inquiry, 11 FCC Rcd at 13014.

[138] Id.

local "retail" advertising.[139] NAA submits that classified advertising sales are irrelevant in the context of newspaper/broadcast competition, since radio and television stations typically have no involvement whatsoever in the classified ad field. The statistics cited by the Commission are further flawed in that they apparently do not include "breakouts" of local advertising revenues for such significant competitors as magazines, farm and business publications, and -- most significantly -- direct mail advertisers.

Moreover, neither the national nor the local advertising marketplace is the monolithic arena the Commission appears to assume. For example, newspapers depend heavily on classified advertising revenues, an area in which broadcasters are not involved. On the other hand, radio stations often target advertisers who seek to reach particular demographic groups or specialized audiences, whereas daily newspapers typically attract advertisers seeking to reach a broader, "mainstream" audience. Radio advertising also tends to be less expensive than television commercial time, and therefore is likely to attract a different customer base. In other words, advertisers utilize different media for different purposes, and analysis of competition among those media is not susceptible of any simple formulistic approach.

In any event, there is no suggestion on the record to date that newspaper/broadcast cross-ownership poses a threat of undue concentration either in the advertising market as an undifferentiated whole or in any particular sector of that

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[139] See NAA Facts About Newspapers at 10; Robert J. Coen, '96 Expected to Deliver Energetic Ad Growth, Advertising Age, May 20, 1996, at 22 (Chart by McCann-Erickson Worldwide, US Advertising Volume).